

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

THOMAS LAVELLE,  
Appellant,

v.

DEPARTMENT OF THE NAVY,  
Agency.

DOCKET NUMBER  
PH075287C0448

DATE: JUN 13 1988

Dennis L. Friedman, Esquire, Philadelphia,  
Pennsylvania, for the appellant.

S. Lane Pittman, Philadelphia, Pennsylvania,  
for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

This matter is before the Board upon a Compliance Recommendation issued on January 14, 1988, by the Philadelphia Regional Office. 5 C.F.R. § 1201.183(a)(4)(ii). The Recommendation found the agency in non-compliance and, as a sanction, ordered the agency to pay appellant the overtime and night differential he claimed was due him. We VACATE the Recommendation and REMAND this case for further proceedings as outlined below.

BACKGROUND

Appellant petitioned the Board to enforce a September 10, 1987 initial decision which reversed the agency's imposition of a 30-day suspension.<sup>1</sup> Appellant complained that when the agency awarded his back pay it failed to explain how the amount was computed. He believed, however, that the award did not include payment of overtime he actually worked, 22 days of regular pay, and weekend overtime he would have worked but for the unlawful suspension. Appellant also claimed that, but for the unlawful disciplinary action, the agency would not have taken him off the second shift and placed him on the day shift, with a resulting loss of 7 1/2 percent night differential pay.

The administrative judge issued two orders to the agency to respond to appellant's allegations, but the agency failed to respond to either order. The administrative judge then found the agency in non-compliance with the Board's decision reversing the 30-day suspension and, as a sanction for failing to respond to Board orders, ordered the agency to pay appellant the overtime and night differential he claimed was due him. The agency was also ordered to provide evidence of compliance to the Clerk of the Board within 15 days of the Recommendation or to file a brief of disagreement within 30 days.

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<sup>1</sup> Neither party filed a petition for review and the initial decision became final on October 15, 1987.

On February 12, 1988, the agency filed a brief in disagreement. The agency submitted a chart showing its computations for the back pay award, supported by a handwritten form listing the deductions subtracted from appellant's award. In support of its position that appellant was not owed any weekend overtime due to the cancellation of the 30-day suspension, the agency provided a copy of appellant's time card which showed that appellant had worked weekend overtime on March 21, June 14, and August 15, 1987. From this record and its "review of the work project to which Mr. Lavelle was assigned at the time of his suspension," the agency argued that appellant would not have worked any overtime during the June 18 to July 17, 1987 suspension period. The agency also stated that appellant "was assigned to day shift for months prior to his suspension and afterwards," and therefore was not entitled to night shift differential.

Appellant filed a response to the agency's brief, disputing the agency's claim. First, he pointed out that the agency's computation chart showed that appellant was due "\$3,570.92" but that the agency paid him only "\$3,342.24." Also, he argued, the agency did not present any documentation to support its claim that appellant had received a \$151.92 adjustment for the pay period ending October 10, 1987. Then, appellant disputed the agency's computation of weekend overtime based upon his pre- and post-suspension work record. Rather, he alleged, the

overtime should have been computed based upon the amount of overtime worked by other similarly situated supervisors in his section, Shop 11, during the 30-day suspension period. Finally, appellant argued that his reassignment from the second shift was directly related to the agency's disciplinary action and resulted in the loss of night differential pay. Therefore, he concluded, the fact that he was on the day shift when the agency finally imposed, and he served, the suspension was of no consequence.

#### ANALYSIS

When an agency is ordered by the Board to cancel a disciplinary action, compliance with that order requires the agency to restore the appellant as nearly as possible to the status quo ante.<sup>2</sup> *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The Kerr court found that the Board's enforcement powers are broader than its statutory appellate jurisdiction. Moreover, the Board has a duty to "make a substantive assessment" of an appellant's

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<sup>2</sup> The Kerr court defined status quo ante as follows:

The Supreme Court long ago stated that the general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

*Id.* at 733 n.3, quoting *Wicker v. Hoppock*, 6 Wall. 94, 99 (1867), quoted with approval in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975).

return to duty when faced with a compliance petition. Kerr, 726 F.2d at 733.

In order to return an appellant to the status quo ante, the Board, in accordance with the Back Pay Act, 5 U.S.C. § 5596, orders an agency to award all back pay and benefits which are due the employee. The specific statutory language provides that an employee:

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred....

5 U.S.C. § 5596(b)(1)(A)(i). Thus, under its compliance jurisdiction, the Board has oversight to insure that an appellant receives all compensation he normally would have earned had the unlawful personnel action not occurred.

Concomitantly, the Board must also insure that an appellant does not receive any amount that is in excess of that which he would normally have earned. *Swafford v. Tennessee Valley Authority*, 30 M.S.P.R. 130 (1986) (an employee cannot recover more than he would have been entitled to had the unlawful personnel action not occurred). Accordingly, we must reverse the administrative judge's order that the agency pay appellant the claimed overtime and 7 1/2 per cent night differential. These payments were not ordered upon a determination that they were due appellant, but rather as a sanction for the agency's failure twice to respond to Board orders. The Board is without authority to

issue a default judgment against an agency. *Mittendorf v. Office of Personnel Management*, 9 M.S.P.R. 484 (1982). Accordingly, we VACATE the Recommendation; thus, the issues of appellant's entitlement to weekend overtime and night differential remain.

Based upon the evidence submitted by the agency and appellant on these two issues, we find there are significant unresolved factual questions that require a remand to the regional office for disposition. As to the issue of the appropriate method of overtime computation, the Board has recognized two different methods: use of appellant's prior overtime assignments or experience of similarly situated employees during the relevant time period. *O'Reilly v. Department of Transportation*, 29 M.S.P.R. 405, 409 (1985). In several cases, the Board has approved a formula of computation using an average of the number of overtime hours worked by similarly situated employees. See *Anderson v. Department of the Air Force*, 33 M.S.P.R. 651, 655 (1987); *Swafford*, 30 M.S.P.R. at 135-36; *O'Reilly*, 29 M.S.P.R. at 410; *Spezzaferro v. Federal Aviation Administration*, 29 M.S.P.R. 412, 413-14 n.2 (1985), *aff'd*, 807 F.2d 169 (Fed. Cir. 1986). The method to be used in a particular case is the one which is most likely to place the appellant in the *status quo ante*. Appellant has alleged that various other similarly situated employees worked weekend overtime during the June 18 - July 17, 1987 period, and concludes that he would also have worked had he not been suspended. Thus, the

agency's finding that appellant was not due any overtime has been challenged and further evidence must be taken to resolve this issue.

Additionally, appellant alleges that he would not have been reassigned from the second shift to the day shift but for the agency's disciplinary action, and that this reassignment resulted in the loss of night differential pay. The agency's response is that "he was assigned to the day shift for months prior to his suspension." Agency Brief in Disagreement, Compliance File, Tab 1. This response does not squarely address the issue.

Appellant does not deny that he was on the day shift immediately prior to his suspension. From a review of the record, however, the sequence of events tends to indicate that appellant's reassignment from the second shift was related to the disciplinary action. The act which led to the unwarranted suspension of appellant, an alleged attempted theft, occurred on August 14, 1986. Appellant was reassigned from the second shift on August 31, 1986. A notice of proposed removal was issued on September 29, 1986, but the agency did not take any action until June 16, 1987, when it suspended appellant for 30 days. Appellant is thus claiming that he will not be returned to the status quo ante unless the Board's remedial order takes into account events which occurred before the effective date of the suspension.

In fashioning a make-whole remedy which is consonant with the Back Pay Act and the Board's broad remedial powers,

our analysis of what appellant "normally" would have earned must not be rigidly circumscribed by the effective date of the personnel action. Where, as here, an agency waits a significant length of time between an appellant's act and the imposition of punishment and, in the intervening time, takes an action against the employee which is not appealable but results in a loss of pay to the employee, then the agency must show that the action was for a legitimate management reason unrelated to the unlawful personnel action.<sup>3</sup> Compare *Summers v. United States*, 648 F.2d 1324, 1327-30 (Ct. Cl. 1981)(overtime pay due employee for reassignment period preceding unlawful suspension), with *Reynaud v. United States*, 225 Ct. Cl. 624, 628 (1980)(premium pay not due when employee validly reassigned); see also Vol. XI Comp. Gen. No. 3, Case No. B-163142 (Feb. 28, 1968)(employee who was reassigned to day shift prior to removal may be paid premium pay if he normally would have earned the pay had he not been removed, to be computed on basis of average premium time of similarly situated employees).

Thus, in this case, the agency must show more than simply that appellant was on the day shift when the


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<sup>3</sup> This standard is consonant with the Board's holding in *Pickard v. Department of Transportation*, 25 M.S.P.R. 404, 407 (1984), that if an alleged constructive suspension preceded a removal but was not appealed, either separately or as a part of the removal, back pay for the alleged suspension period cannot be awarded in the compliance proceeding relating to the removal. In *Pickard*, the alleged constructive removal was an appealable action; in this case, the reassignment is not appealable.

suspension was served. Because appellant has alleged that but for the contemplated disciplinary action he would not have been reassigned from the second shift to the day shift, the agency must show that the reassignment was for a reason unrelated to the alleged theft of property. If the agency cannot show this, then appellant is entitled to night differential pay.

Accordingly, we REMAND this case to the Philadelphia Regional Office for further development of the record with regard to appellant's entitlement to weekend overtime and night differential pay.<sup>4</sup> Additionally, the administrative judge should resolve any remaining disputes over the back pay amount.<sup>5</sup>

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.

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<sup>4</sup> Appellant filed various pleadings while the Compliance Recommendation was before the Board for consideration, including a motion to supplement the petition for enforcement to challenge the agency's re-crediting of leave and a motion to compel the agency's response to interrogatories, along with a copy of the interrogatories. There is no provision for interrogatories at this stage of the enforcement process. However, because this case is being remanded to the regional office for further processing, we make no ruling on these motions. Appellant may renew them before the administrative judge.

<sup>5</sup> It appears from the agency's brief in disagreement and its subsequent submission clarifying an alleged typographical error, that appellant has been properly paid the overtime due for August 14, 1987. The agency, however, should submit proof of payment of the disputed amount to the Regional Office.